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FILED
YOLO SUPERIOR COURT

JUL 10 2009

By

C. Garrett
Deputy

10 **YOLO COUNTY SUPERIOR COURT**

11 **STATE OF CALIFORNIA**

12 **PEOPLE OF THE STATE OF**
13 **CALIFORNIA,**

14 Plaintiff,

15 vs.

16 **MARCO ANTONIO TOPETE,**

17 Defendant(s).

Case no. CR08-3355

**APPLICATION TO SEAL
DECLARATION OF MARY
ELIZABETH GREENBERG IN
SUPPORT OF MOTION FOR
CONTINUANCE OF TRIAL;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
HAYES H. GABLE, III**

20 TO THE HONORABLE JUDGE TIMOTHY L. FALL, JUDGE PRESIDING IN
21 DEPARTMENT TWO OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE COUNTY OF YOLO:

22 DEFENDANT hereby moves to seal the declaration which is conditionally filed under seal
23 herewith. This application is based on the attached memorandum of points and authorities and
24 declaration of counsel.

25 Dated: July 9, 2009

26 *H. Gable*
27 HAYES H. GABLE, III
Attorney for Defendant
28 MARCO ANTONIO TOPETE

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

THIS COURT HAS AUTHORITY TO SEAL ITS RECORDS AT THE REQUEST OF A CRIMINAL DEFENDANT

“[A] trial court has inherent discretion to allow documents to be filed under seal in order to protect against revelation of privileged information.” (*People v. Garcia* (2007) 42 Cal.4th 63, 71-72, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 383, fn. 21.) California Rules of Court, rule 2.551, provides the procedures required for sealing court records:

(b) Motion or application to seal a record

(1) Motion or application required A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.

(2) Service of motion or application A copy of the motion or application must be served on all parties that have appeared in the case. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version.

(3) Procedure for party not intending to file motion or application

(A) A party that files or intends to file with the court, for the purposes of adjudication or to use at trial, records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must:

(I) Lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in (d);

(ii) File copies of the documents in (I) that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order; and

(iii) Give written notice to the party that produced the records that the records and the other documents lodged under (I) will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule.

(B) If the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly remove all the documents in (A)(I) from the envelope or container where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court.

(4) Lodging of record pending determination of motion or application The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it or the record has previously been lodged under

1 (3)(A)(I). Pending the determination of the motion or application, the lodged record will be
2 conditionally under seal.

3 **(5) Redacted and unredacted versions** If necessary to prevent disclosure, any motion or
4 application, any opposition, and any supporting documents must be filed in a public redacted version
5 and lodged in a complete version conditionally under seal.

6 **(6) Return of lodged record** If the court denies the motion or application to seal, the clerk must
7 return the lodged record to the submitting party and must not place it in the case file unless that party
8 notifies the clerk in writing within 10 days after the order denying the motion or application that the
9 record is to be filed.

10 II.

11 THIS COURT SHOULD SEAL THE DECLARATION OF 12 MARY ELIZABETH GREENBERG BECAUSE 13 IT CONTAINS PRIVILEGED INFORMATION

14 In *Garcia v. Superior Court, supra*., the California Supreme Court held that a *Pitchess*
15 motion to discover law enforcement personnel records may be filed under seal to protect privileged
16 information. In so holding, the court looked at the question of protecting the defense's rights to
17 prevent disclosure generally. The court stated that "a ruling on a request to file under seal involves
18 balancing an accused's interest in protecting privileged information against opposing counsel's right
19 to effectively challenge the []motion. In ruling on a request to file under seal, a trial court must
20 carefully weight these competing concerns. (42 Cal.4th at p. 72.)

21 The court further stated that the accused's interest in protecting information that goes to
22 defense strategies and other trial preparations is such that rather than disclosing the information to
23 the prosecution, the defense may present it to the judge alone *in camera*.

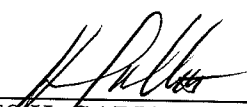
24 [T]he defense is not required, on pain of revealing its possible strategies and work
25 product, to provide the prosecution with notice of its theories of relevancy of the
26 materials sought, but instead may make an offer of proof at an *in camera* hearing.
27 (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320-1321.) . . . [A]
28 trial likewise encompasses the assistance of, and confidential communication with,
experts in preparing a defense. [Citations.] . . . the right logically extends to the
opportunity to investigate and develop evidence generally.
(*Id.* at pp. 73-74.)

In this case, the defense is seeking by noticed motion, a continuance of the trial date. In
support of that motion, the defense penalty phase investigator, Mary Elizabeth Greenberg, has
executed a declaration that details the investigation that has been undertaken thus far and future
investigation. In so doing, Ms. Greenberg sets forth defense strategies, information obtained from

1 the defendant, the defendant's family, other witnesses, and experts, in addition to other work
2 product. Clearly, this type of information is privileged and not subject to disclosure to the
3 prosecution. Accordingly, defendant requests that this application to seal the declaration be granted.

4 Dated: July 9, 2009

Respectfully submitted,

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HAYES H. GABLE, III
Attorney for Defendant
MARCO ANTONIO TOPETE

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9 **DECLARATION OF HAYES H. GABLE, III**
10 **IN SUPPORT OF MOTION TO SEAL**

11 I, HAYES H. GABLE, III, declare:

12 1. I am one of the attorneys of record for the defendant, MARCO ANTONIO TOPETE, in
13 the above-captioned matter.

14 2. This declaration is made in support of the motion to seal the declaration of Mary Elizabeth
15 Greenberg, the defense penalty phase investigator herein.

16 3. Said declaration of Mary Elizabeth Greenberg details defense strategies, information
17 obtained from the defendant, the defendant's family, other witnesses, and experts, in addition to
18 other work product.

19 4. Said information is privileged and may not be disclosed to the prosecution.

20 Executed under penalty of perjury on July 9, 2009, at Sacramento, California.

21
22 
23 HAYES H. GABLE, III

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 430 3rd Street, Woodland, California 95695.

On the date below, I served the following document(s):

APPLICATION TO SEAL DECLARATION OF MARY ELIZABETH GREENBERGIN SUPPORT OF MOTION FOR CONTINUANCE OF TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF HAYES H. GABLE, III

() BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

(X) BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

Yolo County District Attorney

() BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

() BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 10, 2009, at Woodland, California.



THOMAS A. PURTELL